110-321

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 1141.

THE CITY OF EAST ST. LOUIS, AND THE TREASURER OF THE CITY OF EAST ST. LOUIS.

Plaintiffs in Error.

vs.

THE UNITED STATES, EX RELATIONE JOHN F. ZEBLEY.

Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Statement, assignment, of Errors, Brief and Argument of Plaintiff in Error.

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Signal Print.

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STATEMENT.

This is a mandamus suit, commenced in the Circuit Court of the United States for the Southern District of Illinois.

The petition, filed on the 9th day of March 1882, alleges, that John F. Zebley, the petitioner, a resident of the State of New York, on the 12th day of March, 1879, recovered a judgment at law against The City of East St. Louis, a body corporate and politic, existing under the laws of the State of Illinois, and located in said southern district, for the sum of $35,762,87 and costs of suit.

That he did, also, on the 29th day of November 1880, recover another judgment at law against said City of East St. Louis for the sum of $18,673.19, and costs of suit.

That said judgments were recovered in said Circuit Court of the United States for the Southern District of Illinois, and, with the exception of some small credits, to which they are entitled are still in full force and effect, and unpaid.

That said City is in receipt of large revenues from levies from its taxable property, and from licenses derived from various sources allowable and authorized under its charter.

That there are large sums of money belonging to and under the control of said City, derived from its said revenues, and which have not been appropriated by ordinance to any particular purpose, and which are now in the treasury of said City, or under its control, and which are left over and remaining from the fiscal year of said City, commencing March 1st 1881, and ending March 1, 1882, which are surplus funds, not needed to an economical administration of said City.

That said City has other sources of revenue under its charter and the law, which it has not, during said fiscal year above mentioned, collected anything from, and the full power of which, petitioner is entitled to have exercised for the payment of his said judgments.

That there are many subjects of taxation and of license

allowable by the charter of said City, from which revenue might be derived, which said City does not collect, and which petitioner is entitled to have collected.

Prayer: that the Court will take jurisdiction of the matters and things alleged; that said City, and also the City Treasurer of said City, each answer, under rule of Court, in detail, giving particulars, all and each allegation of the petition, and set forth and disclose their assessed and equalized valuation of all city property of every kind, including all railroad property for the year 1881, and the exact amount of licenses, derived by said City from all sources during the fiscal year commencing March 1st 1881, and ending March 1, 1882, and setting forth in detail, all moneys received from all sources during said fiscal year, both what has been collected and what remains uncollected, but that is collectable, and also disclosing and answering in detail all expenditures of said City for all purposes during said fiscal year.

That upon final hearing, he may have a peremptory mandamus writ against said City, or its Treasurer, requiring him or it, to pay to petitioner, upon his said judgments, all surplus moneys now remaining over from the fiscal year last past, whether on hand or in process of collection, so soon as collected, and ordering and directing said City, or its proper authority, to put in force and operation for the

fiscal year commencing March 1st 1882, and ending March 1, 1883, and from year to year, all its lawful and authorized powers for enforcing and collecting revenue or licenses under its charter powers, and within its corporate or other limits, and directing said City, or its proper authority, to apply all thereof, not needed for the most economical administration of its city government from time to time, as the court may direct, toward the payment of said judgments, interest, and costs.

And if there is no surplus, or can be none, as appears upon final hearing hereof. left, or that will be left, after the most economical administration of said City government, then petitioner asks that the Court will order a peremptory mandamus writ, directing the City Council and Mayor of said City, at their proper corporate meeting during the year 1882, to levy a special tax, upon the taxable property of said City sufficient to pay said judgments, interest, and costs, and cause the same to be certified, by the City Clerk to the proper County Clerk according to law.

And if there be a deficiency of surplus revenues, to pay said judgments, interest, and costs, in full, then, that said writ order said special tax to be levied and certified for the deficit only (Printed Record, pp. 2-3).

To which petition the defendants, on the 7th day of April, 1883, by leave of Court, filed their amended answer,

in which they admit that petitioner is a resident of the State of New York, and that he recovered judgments against said City as alleged; but deny that said City is in receipt of large revenues, from its tax levies, and from licenses, as alleged in said petition; deny that there are large sums of money, or any sums of money, whatever, belonging to, or under the control of said City, derived from its said revenues or otherwise, which have not been appropriated by ordinance to a particular purpose; and further deny, that there are any revenues, or any sums of money, or surplus funds whatever, in the treasury of said City, or under its control remaining from its said revenues for the fiscal year beginning in March 1881, and ending in March 1882, as alleged in said petition, or from the revenues of said City for any previous year: deny that said City has any other source of revenue from which it has not collected during said fiscal year, or which petitioner is entitled to have exercised for the payment of his said judgments; and deny that there are many, or any subjects of taxation, or of license which it is authorized by its charter, and the law to tax or license, and from which it has not collected the revenues so authorized.

And further answering, the defendants say, that by the law and charter of said City, one-half of all money received in to the City Treasury, from dramshop licenses collected, is

required to be paid over, at least quarterly, to the treasurer of school township No. 2, North Range 10 West, in St. Clair County, Illinois, for the use and benefit of the public school fund, and is not, and cannot be, legally supplied by said City to any other purpose.

That the charter of said City, in force now, and when the bonds on which petitioner's said judgments were rendered, were issued, limits the power of said City, to levy and collect taxes, for all purposes, to an "annual tax not exceeding one per centum per annum" upon the assessed valuation of all the taxable property within said City.

That the charter of said City, in force as aforesaid, and under which the said bonds were issued, upon which petitioners' said judgments were rendered, limits the power of said City, to raise money to pay said judgments, and all its bonded debts to the levy and collection of an annual tax, not exceeding three mills on the dollar, upon each annual assessment for general purposes, for the purpose of paying the interest on such bonds, and to provide a sinking fund to liquidate the same.

That said City has no power of taxation, under any law of this State, other than the power before mentioned, to levy and collect an annual tax not exceeding one per cent. per annum, to-wit: 7-10 of one per cent. for general purposes, and 3.10 of one per cent. to pay the interest and principal of its bonded debt.

That all of the revenues derived from said annual tax of 7-10 of one per cent. for general purposes, together with all the revenues which said City is authorized to annually collect from licenses, have been needed and used in defraying the necessary current expenses of said City, from year to year, in the past, and will be annually so needed and required in future, and no part of said revenue, derived from the said annual tax of 7-10 of one per cent., or from said licenses, is applicable, under the law, to the payment of petitioner's judgments, or any part thereof.

That the assessed value of all the taxable property within said City, for the year 1881, is the sum of $2,900,000, and for the year 1882, the sum of $3,500,000.

That the principal of the bonded debt of said City, of which petitioner's judgments form a part, amounts to the sum of $270,000 which bears interest, except the part merged in judgments, at the rate of ten per cent per annum; that there are judgments on bonds and certificates of indebtedness, and interest thereon of said bonded debt, including the judgments of petitioner, in the sum of $90,000, which are unpaid and in full force; that the judgments of petitioner were rendered on bonds and interest coupons detached therefrom included in said bonded debt of said city; that all of said bonded debt, except $5,000, paid to Mrs Elizabeth Underwood, by order of the Supreme Court of Illinois, is still outstanding, and unpaid.

That the said tax of 3-10 of one per cent. has been annually levied and applied to the payment of the interest and principal of the bonded debt of said City, but is not sufficient to pay the interest annually accruing thereon.

That said City has neither money nor property with which to pay said bonded debt or petitioner's judgments, or any part thereof or the interest thereon.

That said City has no power, under any law of this State, to levy a tax, for that purpose, other than the said annual tax of 3-10 of one per cent. before mentioned; that it is ready to continue to levy it, and apply the same as far as it will go in the payment of the principal and interest of said bonded debt, unless otherwise ordered by a Court of competent jurisdiction.

That said City therefore prays judgment, whether the levy of the said tax of 3-10 of one per cent. and the collection and application thereof, pro rata, to the payment of the said bonded debt, and the interest thereon, are not a full discharge of its duty in the premises, until the said tax of 3-10 of one per cent. thus levied, collected, and appropriated, shall have fully paid said bonded debt, and the interest thereon. (Printed Record, pp. 8-9)

On the 16th day of April 1883, and at the January Term of said Court, in said year, said cause came on for final hearing in said Court, and a jury having been waived, by

stipulation in writing, the cause was submitted to the Court, and after hearing the proofs offered, and arguments of counsel, it was ordered and adjudged by the Court, that said defendant, the City of East St. Louis, do, through its proper corporate authorities, levy and collect full one per cent per annum taxes, upon the assessed and equalized valuation of all the real and personal taxable property of said City, for the year 1883, and subsequent years, until the full payment and discharge, of all balance due upon said judgments in said petition mentioned, with lawful interest thereon and the costs of said suits wherein said judgments were obtained, as also the costs of this suit.

And it was further ordered and adjudged, that said City do, through its proper corporate authorities, annually commencing, with the year 1883, appropriate and set apart, three thousand dollars, out of three tenths of said one per cent. levy, and the sum of ten thousand dollars, out of the remaining seven tenths of said one per cent. levy, as a special fund, for the payment of said judgments, interest and costs, until the same are fully paid and discharged, and that said City, do annually, through its proper corporate authorities, pay over said sums, so soon as collected, to petitioner's attorney of record, to be applied toward the payment of said judgments, interest and costs.

And further, that said City, do, annually, for the year

1883 and subsequent years, until said judgments, interest, and costs are fully paid, exercise, through its proper corporate authorities, to the full extent of its charter provisions, all its powers and resources of taxation and revenue, derivable from all sources whatever; and that it do, through its said corporate authorities, appropriate, use, and expend, its said revenues, in the most rigid and economical administration of its municipal affairs, to the end, that said judgments, interest, and costs, may be paid as speedily as possible; and that whatever funds remain, at the end of each fiscal year, if any, after such economical administration of its affairs, that it apply the same in further liquidation of said judgments. (Printed Record pp. 10-11.)

And the Court made the following special findings:

1st. That said City of East St. Louis is organized and existing under a special act of the legislature of Illinois, approved March 26th 1869, entitled "An act to reduce the charter of East St. Louis, and the several acts amendatory thereto, into one act, and to revise the same," and that the bonds upon which the judgments of relator were rendered were issued under and in pursuance of said act.

2nd. That said City, by its said charter, is limited in its power to tax for all purposes to an "annual tax not exceeding one per centum per annum" upon the assessed value of all the taxable property in said City.

3rd. That said charter requires that a registry shall be kept of all bonds, issued, and that the City Council shall levy and collect a tax not exceeding three mills on the dollar upon each annual assessment made for general purposes, for the purpose of paying the interest on such bonds and to provide a sinking fund to liquidate the same.

4th. That said City has no power of taxation, other than said annual tax of one per cent. above mentioned, and no other source of revenue, except that derived from licenses, which amount annually, to the sum of $35,000, of which sum $16,000, is derived from the licensing of dramshops, and one half of this sum is required by said charter, to be paid over to the treasurer of school township No. 2, North Range 10 West, in St. Clair County, Illinois, for the use and benefit of the public school fund.

5th. That the assessed valuation of all the taxable property in said City is $3,500,000.

6th. That the bonded debt of said City is $300,000.

7th. That petitioner's judgments aggregate the sum of $55,000.

8th. That said City has no money, or surplus funds, in its treasury with which to pay petitioner's judgments, or any part thereof, and no means of paying them except that derived from taxation and licenses.

9th. That said City has heretofore expended the sum

of to-wit: $75,000 per annum to defray the current expenses of the City government and the different departments thereof. but the court finds that such sum is not necessary for the present and future years.

10th. And finally, the Court finds from the evidence, that the $10,000, ordered to be appropriated, from the seven-tenths of one per cent. of the tax levy of 1883, and subsequent years, and applied to the payment of said judgments, is not required to defray the necessary current expenses of said City, and further find, that the three thousand dollars, ordered to be appropriated from the three-tenths of one per cent. and applied to the payment, of said judgments, is petitioner's pro rata share of said three tenths of said one per cent. (Printed Record, pp. 11-12.)

The evidence in this case shows, that the City of East St. Louis will require the sum of $75,000 to defray the necessary current expenses of the City for the fiscal year 1883-4. On pages 44 and 45 of the Printed Record, will be found the testimony of John B. Lovingston, who, for 24 years, has been a resident of said City, and who has been the Mayor, and also an Alderman thereof, and who is conversant with the finances of said City, and the revenues necessary to meet and defray its current expenses; he gives a tabulated statement, in detail, of what he declares to be a reasonable estimate for the ensuing year's expenses,

if administered in a prudent and economical manner, the aggregate of which amounts to the sum of $76,020,00.

His testimony is corroborated, by all of the other witnesses in this cause who testify to the point viz: that of George W. Dausch, City Treasurer, (Printed Record pp. 14-15-16) James Shannon, City Clerk (pp. 17-18-19,) O. R. Winton, Mayor, (61-62) and William P. Launtz, Judge of the City Court of said City (pp. 42-43.)

The Annual Report of the City Clerk of said City for the fiscal year ending in March, 1883, showing the amount expended in each department of the City government for said year amounts to the sum of	$73,218 58
The assessed valuation of the taxable property of said City is	3,500,000 00
A tax of one per cent. per annum upon this assessment, produces	35,000 00
Seven tenths of which, applied to the payment of current expenses, is the sum of	24,500 00
The license revenue of said City amounts annually to the sum of	35,000 00
Of this sum there is derived from dramshop licenses	16,000 00
One-half of which goes to the Public Schools:	8,000 00

Leaving, from the license revenue, with which to pay current expenses: 27,000 00

And this added to $24,500, seven-tenths one per cent. direct tax levy, makes the sum of 51,500 00

Out of this sum the Court has ordered the sum of $10,000 to be paid annually on petitioner's judgments until paid, which leaves, the sum of $41,500, with which to defray all of the current expenses of said City, which heretofore, according to the findings of the Court have been, $75,000 per annum. And which said sum of $75,000 per annum, the evidence shows, the City will require for the present and future years to defray the necessary current expenses of the different departments of the City government.

The Charter of the City of East St. Louis, is incorporated, in full, into the Record, but the only provisions thereof, specially applicable to this cause are the following, to-wit:

Section 1, Article 3. "The City Council shall have power to levy and collect an annual tax, not exceeding one per centum per annum, upon all property, real and personal, within the jurisdiction of the City, upon the assessed value thereof, in such manner as may be prescribed by ordinance, not inconsistent with the constitution of this State; and the City Council may adopt, as near as may be, the mode and manner prescribed by general law for the assessment and

collection of the State and county taxes; and the assessor and collector of said City shall have the same power as the assessor and collector under the general laws of this State." (Printed Record, p. 23.)

Section 12, Article 7. "One-half of all the money received into the City treasury from dramshop licenses collected, shall be paid over, at least quarterly, to the treasurer of School Township No. 2, North, Range 10 West, in St. Clair County, Illinois, by him to be apportioned to the several schools taught in said City under the general school laws of this State, in the same mode and manner, as interest on the township school fund, is now required to be apportioned and credited to the respective school districts, and shall be liable to the order of the respective school boards, of school directors, as other funds, for the support of the said schools in said City respectively." (Printed Record p. 36.)

Section 22, Article 7. "A registry shall be kept of all bonds, scrip, or certificates of indebtedness issued, showing a full exhibit of all material facts in relation thereto; and the City Council shall levy and collect a tax not exceeding three mills on the dollar, upon each annual assessment made for general purposes, for the purpose of paying the interest on such bonds, scrip, or certificates of indebtedness, and to provide a sinking fund to liquidate the same." (Printed Record, p. 37.)

Section 4, Article 3. "The City Council shall have power to appropriate money and provide for the payment of the debt and expenses of the city, to borrow on the credit of the city a sum of money not exceeding one hundred thousand dollars ($100,000), to issue bonds, scrip, or certificates of indebtedness therefor, in such amounts and bearing such interest, and payable at such times and places and in such manner as the City Council shall deem will make such bonds, scrip, or certifieates most valuable and salable and best for the interests of the city; but no bond, scrip, or certificate shall exceed in amount one thousand dollars ($1,000), nor bear a greater interest than ten per cent. per annum." (Printed Record, p. 23.)

ASSIGNMENT OF ERRORS.

1st. The Circuit Court erred in awarding a peremptory writ of mandamus against said City of East St. Louis, commanding it, through its proper corporate authorities, to appropriate the sum of thirteen thousand dollars from its annual tax levy for the year A. D. 1883 and subsequent years, and apply the same to the payment of relator's judgments till fully paid.

2nd. The Circuit Court erred in ordering and adjudging that said City do, through its proper corporate authorities, annually, commencing with the year A. D. 1883, appropriate and set apart three thousand dollars out of three-tenths of one per cent. of the tax levy of said City as relator's pro rata share of said three-tenths of one per cent., and the sum of ten thousand dollars out of the remaining seven-tenths of said one per cent. levy as a special fund for the payment of relator's judgments, interest, and costs, untill the same are fully paid and discharged.

3rd. The Circuit Court erred in ordering and adjudging that said City do, annually, for the year A. D. 1883, and subsequent years, until said judgments, interest, and costs

are fully paid, exercise through its proper corporate authorities, to the full extent of its charter provisions, all its powers and resources of taxation, and revenue derivable from all sources whatever, and that after the most rigid and economical administration of its municipal affairs it apply whatever funds may remain, if any, at the end of each fiscal year, in further liquidation of said judgments.

4th. The Court erred in admitting, on the trial, evidence in regard to revenue derived from the collection of licenses and disbursements of the same, and in regard to the levy, collection, and disbursement of taxes by the City, other than evidence touching the levy, collection, and disbursement of three-tenths of one per cent. of the annual tax levy of said City.

BRIEF AND ARGUMENT.

II.

The judgments of petitioner were rendered on bonds and coupons, issued under the charter of the City of East St. Louis, which expressly limits the City's power of taxation to pay them to an annual "tax not exceeding three mills on the dollar for the purpose of paying the interest on such bonds, and to provide a sinking fund to liquidate the same." This is the law under which all the bonds of said City were issued and its bonded debt of $300,000 contracted. It authorizes an annual tax, not exceeding one per cent., for all purposes; seven-tenths of one per cent. for general purposes, and three-tenths of one per cent. to pay the interest and principal of its bonded debt.

This charter entered into and formed a part of the contract between the City and the purchasers of its bonds, and the petitioner and the City are alike bound by its terms. Neither can detract from, nor add to the power therein conferred, nor change the limit therein expressed.

The power to issue the bonds, and the power to levy an annual tax not exceeding three-tenths of one per cent, to pay them, are parts of one and the same charter, of one and the same statute, and of one and the same contract.

A contract, the obligations of which the State itself could not impair, and by the terms of which the parties to this cause are equally bound.

Von Hoffman v. City of Quincy, 4 Wall, 535.

The city of East St. Louis is willing to levy said annual tax of three-tenths of one per cent. and apply it to the payment of the interest and principal of its bonded debt. It will be seen by reference to the return or its answer to the petition of relator in this cause, that it has so levied and applied said tax in the past and is willing to continue so to do in future, until petitioner's judgments and said bonded debt are paid, unless otherwise ordered by a court of competent jurisdiction. (See Printed Record, pp. 9-10.)

But defendant in error was not satisfied with this authorized annual tax of 3-10 of one per cent. and the court below ordered the City of East St. Louis to levy, collect and appropriate from the 7-10 of one per cent. authorized for general purposes the sum of $10,000 per annum in addition to the said 3-10 of one per cent. authorized, and apply it in payment of said judgments until the same are fully paid.

This action of the Court in ordering the levy and application of $10,000 per annum to the payment of said judgments in addition to the special tax of 3-10 of one per cent. authorized by law, is clearly erroneous.

It has neither law nor justice to sustain it. The law for-

bids it, and justice and the law alike require that the 7-10 of one per cent. be applied to the payment of current expenses and the general creditors of the City for which purpose it is exclusively authorized and levied.

This tax of 3-10 of one per cent. is a limited and special tax authorized exclusively for the payment of the interest and principal of the City's bonded debt,—and said city has no power under any law of this State to levy any additional tax whatever, for any such purpose; and without which, it is powerless to obey the order and judgment of the court.

"It is," says Judge Dillon, "a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the *power be plainly and unmistakably conferred*. It has, indeed, often been said that it must be specifically granted *in terms;* but all courts agree that the authority must be given either in express words or by necessary implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience or advantage."

2 Dillion on Mun. corp. (3rd Ed.) sec. 763.

And the above is the law as laid down by this court.

All the bonds of said City were issued under Sec. 4, Art. 3 of its charter and the ordinances passed in pursuance

thereof, and the provisions of said charter of said City of East St. Louis in regard to taxation are contained in Sec. 1, Art. 3, and Sec. 22, Art. 7, and are clear and explicit, and leave no room for doubt as to their meaning.

The power granted and the *limit* on said power are clearly and definitely expressed.

Section 1, Article 3, says—"The City Council shall have power to levy and collect an annual tax not exceeding one per centum per annum upon all property, real and personal within the jurisdiction of the City, upon the assessed value thereof, in such manner as may be prescribed by ordinance," and Section 22, Art. 7, that a "registry shall be kept of all bonds issued, showing a full exhibit of all material facts in relation thereto; and the City Council shall levy and collect a tax not exceeding three mills on the dollar, upon each annual assessment made for general purposes, for the purpose of paying the interest on such bonds, and to provide a sinking fund to liquidate the same."

In Loan Association v. Topeka 20 Wall, 660, this court say—"It is to be inferred that when the legislature of the State authorizes a County or City to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." In the above language of this

Court, the law applicable to the case at bar, is clearly expressed.

If there is no limit expressed, the power to contract the debt implies the power to levy a sufficient tax to pay it, but when there is a limit on the power to tax to pay the debt in the act itself which authorizes its contraction, then this limit repels the inference of any implied power to tax and must control.

A limit on the power to tax could not well be more clearly expressed than the limit expressed in the City's Charter, in the act itself which authorizes the issuance of the bonds and the contraction of the debt.

Section 1, Art. 3, authorizes an annual tax *not* exceeding one per centum per annum for *all* purposes, and Section 22 Art. 7, authorizes an annual "tax *not* exceeding three tenths of said one per cent. for the payment of the bonded debt.

The limit for all purposes is one per cent. per annum, and for the payment of the bonded debt 3-10 thereof.

And it has been so held by the Supreme Court of Illinois. These identical provisions of the charter have twice been before the Supreme Court of Illinois for construction, and have been as often directly passed upon and construed by said Court.

They first came before that court for construction in the case of Weber, collector, v. Traubel *et al.* 95, Ill. 47. This

was a proceeding in chancery, by certain taxpayers, to enjoin the collection of taxes in the City of East St. Louis, on the ground that they were in excess of the rate to which the City is, by its charter, limited in levying taxes.

In that case a tax of 14 mills on the dollar had been levied by the City, 10 mills or one per cent. for general purposes under Sec. 1, Art. 3, of the City Charter, 3 mills for the bonded debt under Sec. 22, Art. 7 of said charter, and one mill for the Public Library then in existence and which tax of one mill on the dollar for its support was supposed to be authorized under the general statutes which authorized the establishment of said Library by the City, and it was contended by the City that the 3 mill tax authorized by said section 22 for the payment of the bonded debt was in *addition* to the one per cent. authorized by said section 1 for general purposes; but the Court held that the three-tenths were not in addition to the one per cent. but included therein.

Court say—"The limitation here in Sec 1, Art. 3, is without qualification or exception. It is upon this grant of power to levy and collect taxes generally, and its effect is, in no case shall the tax, to be levied annually, exceed one per centum per annum upon all property, real and personal, within the jurisdiction of the City, upon the assessed value thereof.

This is not to be extended by implication, according to the authorities referred to,—and we are only, then to inquire, is there certainly a repugnanc ybetween this language and so much of sec. 22, art 7, as provides that the City Council shall levy and collect a tax, not exceeding three mills on the dollar, upon each annual assessment, etc.

To our apprehension there is no repugnancy whatever. The limitation in Sec. 1, Art. 3, is upon taxation generally, that is to say, for each and every purpose. Whatever the purpose may be, the aggregate amount of taxation cannot exceed this rate per cent.

But further than restricting the rate per cent. of taxation in the aggregate, it does not assume to impose any limitation.

But Sec, 22, Art. 7, is not a grant of power to impose taxes generally, but simply enjoins the duty of providing by taxation, to meet certain registered indebtedness, limiting the taxation in that regard to three mills on the dollar, leaving the remaining seven mills on the dollar to be used, if necessary, by the City to meet the current expenses and other classes of indebtedness. In other words, sec. 1, art. 3, limits the rate of taxation in the aggregate, while sec. 22, art. 7, limits the registered indebtedness, therein described, to a definite per cent. of the limitation upon aggregate indebtedness.

For all purposes there may be a levy of one per cent.—for this purpose there can only be a levy of three-tenths of one per cent."

Weber v. Trauble *et al.* 95 Ill. p. 431.

These provisions next came before the Court in the case of the City of East St. Louis v. Underwood ex'x, 105 Ill., p. 312, where the case of Weber v. Trauble, *supra* was cited and the decision therein approved and followed by the Court.

The Underwood case was a proceeding by *mandamus* to enforce the payment of a judgment recovered upon bonds and coupons of the City of East St. Louis, which said bonds and coupons were issued under the same charter, and were of the same class and similar to the bonds and coupons on which the judgments of the petitioner in this case were rendered. In the Underwood case it was held that the City was limited in its power to tax for all purposes to an annual tax not exceeding one per cent., seven-thenths of said one per cent. for general purposes, and three-tenths of said one per cent. for the payment of its bonded debt, if so much should be required.

The above decisions of the Supreme Court of Illinois construing the sections in question of the statute of this State, establish their meaning, and this construction of them, by the highest Court of the State is binding on the Courts of the United States, and will be followed by them.

In Leffingwell v. Warren, 2 Black 603, this Court said: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text." And in the Town of Elmwood v. Marcy 92, U. S. 294, this Court say—"We have always followed the highest Court of the State in its construction of its own constitution and laws."

And in Supervisors v. United States, 18 Wall, 81–2, the Court say, "that the construction of the statutes of a State by its highest Courts is to be regarded as determining their meaning and generally as binding upon United States Courts cannot be questioned. It has been asserted by us too often to admit of further debate." And again in the Town of South Ottawa v. Perkins, 94 U. S. 267, the Court further say, "this Court has always held that the laws of the States are to receive their authoritative construction from the State Courts, except where the Federal constitution and laws are concerned; and the State constitutions, in like manner, are to be construed as the State Courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities."

The decisions of this Court above referred to show that the decisions of the highest Court of a State construing the

provisions of a statute of such State are conclusive on the rights of the parties before the Court and that such decisions will be followed by the Supreme Court of the United States.

No Federal question is here involved, and the decisions of the Supreme Court of Illinois construing this statute are conclusive. They settle the rights of the parties. They are conclusive against the position contended for by defendant in error, and against the correctness and validity of the order and judgment of the Court below.

The statute says the City Council shall levy and collect an annual tax *not* exceeding three-tenths of one per cent. for the payment of this bonded debt, of which petitioner's judgments form a part. This is the extent and limit of the City's power to levy and appropriate money for that purpose, but the Circuit Court disregards this positive limit of the statute and orders the City to appropriate, in addition to the authorized three-tenths of one per cent., the sum of $10,000 per annum from the seven-tenths authorized exclusively for the payment of another and different class of indebtedness, and apply it to the payment of these judgments. The City is powerless, under the law, to obey this order of the Court, and this Court will not, by mandamus, command an unauthorized act.

The City is willing to levy and thus appropriate the special tax of three-tenths authorized for that purpose as

shown by its answer, and a Court will not by mandamus compel the doing of an act which the defendant admits on the record he is willing to do without coercion.

The People v. Dulaney, 96 Ill., 503.

Courts will not, by mandamus, order municipal officers to do an act which it is not their duty to perform, without the order of the Court.

Commissioners of Highways v. The People, 99 Ill. 587.

In a late case this Court say—"It need not be said that no Court will by *mandamus* compel County officers of a State to do what they are not authorizud to do by the laws of the State. A *mandamus* does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty."

United States v. County of Clark, 95 U. S. 773.

The rule is uniform and inflexible that the writ will not be granted unless the relator's right to it is clearly established.

The People v. Johnson, 100 Ill. 543.

The relator must not only show a clear right to the writ, but he must also show that the act sought to be enforced is lawful and proper in itself, and that it is one the defendant may lawfully do.

The People v. Village of Crotty, 93 Ill. 180.

This the relator has not shown in this case and cannot. He cannot show that the City can lawfully make the levy

and appropriation as ordered, because the law containing its only grant of power to tax, forbids it doing the very act ordered.

This charter says that it shall *not* levy in any one year for the payment of its bonded debt a tax exceeding three-tenths of one per cent.; yet in the face of this positive prohibition, the Court below orders the City to levy and apply to that purpose the additional sum of $10,000 per annum.

This is not the law. The Supreme Court of Illinois have settled this question.

The Court say—"For all purposes there may be a levy of one per cent.—for *this* purpose there can *only* be a levy of *three-tenths* of *one* per cent."

Weber v. Traubel, 95 Ill. 431.

This limit of three-tenths of one per cent. cannot be exceeded. It is contained in the very act which authorizes the contraction of the debt. And it is a universal and inflexible rule, adhered to by all the Courts, that "when a bonded debt is authorized, and the power of taxation for its payment is limited by the act itself, and by the general statutes in force at the time, to the special tax designated in the act, there is a want of power to levy any greater tax than the one thus specially provided and limited."

2 Dillon Mun. Corp. (3 Ed) Sec. 851.

This question was directly before this court in the case of

the United States v. County of Macon 99, U. S. 590, where the law applicable to this case was clearly expressed and enforced. The Court say—"If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one-twentieth of one per cent., and the case is thus brought directly within the maxim *expressio unius est exclusio alterius.*

Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself, and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued.

The general power of taxation to pay County debts is as ample now as when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfre-

quently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the County was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment.

We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize.

We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.

In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent. for general purposes.

What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order."

United States v. County of Macon, 99 U. S. 590–1.

To same effect, see—

Shackelton v. Town of Guttenberg, 39 N. J. L. 661–665.

United States v. Lincoln Co. 5 Dillon C. C. R. 198.

Jeffries v. Lawrence, 42 Iowa, 505–6.

Waters v. Sapeer, 40 Mich. 627.

Matter Second Avenue M. E. Church, 66 N. Y. 395.

Berwest v. City of St. Louis, 19 Mo. 179.

In the Shackelton case *supra* the relator had recovered judgments against the Town of Guttenderg on three "improvement certificates" for $460,49, $560, and for $340, respectively.

Execution had been issued thereon and returned unsatisfied, and the Supreme Court of New Jersey in a well considered opinion say—"The council of the town was thereupon requested, by the relator, to pass an ordinance directing a tax to be levied to raise the amount of his judgments, but refused, on the ground of want of legal authority to order any larger sum than $1,000 to be assessed in each year. The relator now prays a *mandamus*, compelling the council to make the provision requested.

The duty to pay is clearly and conclusively established by the judgments, and, executon failing all ordinary legal remedy is exhausted, so that the conditions which justify a resort to *mandamus*, exist, viz: a clear legal right, requiring the performance of a specific duty, and no other adequate

means of redress. * * * The applicability of this general rule to the case in hand is, however, denied, on the affirmation that the defendant has no authority to direct the levy of the tax which we are asked to command.

If this affirmation be true, it is clear we should not grant the writ. It is necessary, therefore, to ascertain the defendant's authority in this regard.

Every lawful tax rests upon legislative enactment, and subordinate bodies that seek to impose such a burden upon the citizen, must be able to show a power so to do, derived from positive statute. The grant relied on must also be evident and unmistakable. It is not, perhaps, requisite that express authority to levy taxes for every specific purpose for which they are imposed, should be produced. The power, or, more guardedly speaking, an extension of power, might, under certain circumstances, be implied. * * * As, however, the power of taxation is a high prerogative of sovereignty, and one whose exercise directly divests the citizen of his property, its grant, by implication, is little favored, even as compared with other implied grants; and the inference of its existence, in any case, is easily rebutted. An authority to wield it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any considerations of convenience or advantage.

Nothing short of express words or necessary implication will answer the purpose. It should never be exercised when the right is doubtful.

Under the guidance of these principles, then, must we consider the powers of the defendant.

The town of Guttenberg was incorporated by act of March 9th, 1859. Pamph. Laws, p. 199. Its charter (Section 7) provides that for the payment of the expenses incident to the corporation other than those relating to streets, it should be lawful for the council, to order a sufficient sum, not exceeding $200 in any one year, to be levied for that purpose. * * * In a supplement of April 9th, 1875, (Pamph. Laws, p. 612) it was enacted (Section 5) that the Board of Councilmen should have power to pass and enforce ordinances to provide for raising a sum, not exceeding $1,000 a year, for defraying the incidental expenses incurred by the provisions of the act. Section 8 of this supplement gives the Board power to issue certificates of improvement, payable in one year or more at their discretion for work done on the streets."

These are all the powers of taxation the town had, and the certificates on which the judgments were rendered were authorized and issued under the above act for labor done on the streets." The Court refused the writ for want of power in the corporation to levy a tax in excess of the

limit prescribed, and in conclusion say: "The powers delegated for the payment of these debts may have proved inadequate, and it may be convenient and just, that they should be made sufficient, yet, as we have seen, it is not within the scope of judicial authority to eke them out by dubious presumptions. Creditors, whose rightful claims cannot be satisfied by their exercise, must seek further aid from the legislature, on whose faith they may safely rely."

Shackelton v. Town of Guttenberg, 39 N. J. L. 665.

The same principle has been recognized and announced in other decisions of this court.

Loan Association v. Topeka, 20 Wall, 660.

United States v. Clark, 95 U. S. 773.

Louisiana v. United States, 103 U. S. 289.

We might cite other and additional authorities which recognize the principle and enforce the doctrine as laid down by this court, and as contended for by us, but we think a further citation unnecessary.

The authorities cited conclusively show that the Court below had no power under the law to compel the City by mandamus to levy and appropriate to the payment of petitioner's judgments the sum of $10,000 per annum in *addition* to the special tax of three-tenths of one per cent. specially provided and limited for the payment of these bonds in the very act under which they were issued.

III.

The Circuit Court, in the special findings of fact, made in this case, finds from the evidence, that said City has heretofore expended the sum of seventy-five thousand dollars per annum to defray the current expenses of the City government, and the different departments thereof; but the Court finds that such sum is not necessary for the present and future years, and further finds that the ten thousand dollars, ordered to be appropriated from the seven-tenths of one per cent. of the tax levy of 1883 and subsequent years, and applied to the payment of petitioner's judgments, is not required to defray the necessary current expenses of said City. These are the reasons of the Court for ordering the City to pay, on petitioner's judgments ten thousand dollars, out of seven-tenths of the annual tax levy of one per cent., until said judgments are paid.

Had the Circuit Court any power to make such a finding? We think not. The City, by its charter, or organic law, is limited, in levying taxes, to an annual tax of one per centum per annum, upon all property, real and personal, within the jurisdiction of the city, upon the assessed value thereof; and it has no other power of taxation under any

law of the State of Illinois, and no other source of revenue except that derived from licenses; and by said charter, three-tenths of said annual tax levy of one per cent. is set apart for the payment of the bonded debt of said City and the interest thereon; leaving seven-tenths of one per cent., which, with the license revenue, is dedicated to the payment of the current expenses and the general creditors of the City government.

Can the Courts control the use and expenditure of this revenue and decide for the City, how much of it will be needed to defray the current expenses of the City government? We apprehend the Courts have no such power, yet this is just what has been done in this case. The Court has decided that ten thousand dollars, annually, out of the seven-tenths of one per cent. will not be needed by the City to pay its current expenses for the present and future years.

By section 1, article 2, of the City Charter, the City government is vested in a City Council and Mayor, and by section 4, article 3, of the charter it is provided that the City Council shall have power to appropriate money and provide for the payment of the debt, and expenses of the City. This necessarily involves the exercise of judgment and discretion, as to the manner in which the debt, and expenses of the City shall be provided for, and the amount of revenue required for that purpose, and this power will not

be interfered with or controled by the Courts. Judge Dillon, in his excellent work on Municipal Corporations, says: "Power to do an act is often conferred upon municipal corporations, in general terms, without being accompanied by any *prescribed mode* of exercising it. In such cases the Common Council, or governing body, necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used. This discretion cannot be judicially interfered with, or questioned, except where the power is exceeded or fraud is imputed and shown, or there is a manifest invasion of private rights. Thus, where the law or charter confers upon the City Council, or local legislature, power to determine upon the expediency, or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the Courts. In such case, the decision of the proper corporate officers is, in the absence of fraud, final, and conclusive, unless they transcend their powers."

Dil. Mun. Corp. (3rd ed.) sec. 94.

In the case of The People *ex rel.* v. The City Council of the City of Cairo (50 Ill. p. 154), which was a mandamus proceeding to compel the payment of a judgment against the City of Cairo, it was held by the Supreme Court of Illinois, that while the City authorities, could not

levy a tax beyond the limits assigned in their charter, yet such available means, as are at the disposal of the City, raised under the taxing power, and without diverting the funds from their original purposes as specified in the charter, should be applied to the payment of the judgment.

The People *ex rel.* v. The City Council of the City of Cairo, 50 Ill., 154.

The City of East St. Louis v. The People *ex rel.*

6 Bradw. App. Ct. Rep., 76.

An order, requiring the City to administer its fiscal affairs, in a prudent and economical manner, and apply any surplus remaining at the end of each year, after the payment of necessary current expenses, on petitioner's judgments might, perhaps, be unobjectionable, because it would not interfere with the discretion of the City Council to determine, in the exercise of its best judgment, the amount needed for current expenses. But in this case, the Court finds, that there are no available means, in the City treasury, to apply on petitioner's judgments, and then decides, for the City, that it can dispense with the sum of ten thousand dollars annually out of its current revenues in the future, until petitioner's judgments are paid. This is an assumption by the Court of a discretionary power vested by the Legislature of Illinois in the City Council; it is an absolute determination by the Court for the City, of what it will

need, in the future, to meet its current expenses, leaving the City Council, no discretion to be exercised in the matter.

Dil. Mun. Corp., sec. 832.

High, in his work on Extraordinary Remedies, says: "But the most important principle to be observed in the exercise of the jurisdiction by mandamus, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature, and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the mandamus is sought. This distinction may be said to be the key to the extended system of rules and precedents forming the law of mandamus and few cases of applications for this extraordinary remedy occur which are not subjected to the test of this rule. Stated in general terms, the principle is, that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties necessarily calling for the exercise of judgment and discretion, on the part of the officer or body, at whose hands their performance is required, mandamus will not lie. The application of the rule is universal and its illus-

trations are as multiform as are applications for the aid of this extraordinary remedy. It applies with especial force to cases where the aid of mandamus is sought against inferior Courts or Judges, public officers, municipal authorities, and corporate officers generally, and in all these cases, it is the determining principle in guiding the Courts to a correct decision. And wherever such officers or bodies are vested with discretionary power, as to the performance of any duty required at their hands, or where, in reaching a given result of official action, they are necessarily required to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion, nor control or dictate the judgment or decision which shall be reached. But if, upon the other hand, a clear and specific duty is positively required by law of any officer, and the duty is of a ministerial nature involving no element of discretion, and no exercise of official judgment, mandamus is the appropriate remedy to compel its performance, in the absence of any other adequate and specific means of relief, and the jurisdiction is liberally exercised in all such cases."

High on Extraordinary Remedies Sec. 24.

See also, *Ibid*, Sec. 325, and 418.

Petitioner's judgments aggregate the sum of $55,000 and

if the amount ordered by the Court in this case—$13,000—be paid each year in liquidation thereof, it will take four or five years to pay the judgments in full.

How is the Court to know, for that length of time, in the future, that the City can spare ten thousand dollars annually from its current revenues, and devote it to the payment of these judgments? The municipal authorities, themselves, cannot determine, so far in advance, what the corporate needs will be.

The City of East St. Louis is required to assess and collect its taxes, in the manner provided for by Article 8, of an act of the legislature of Illinois entitled "An act to provide for the incorporation of Cities and Villages," approved April 10th 1872, (see Sec. 256, Chapter 24, R. S. Ill. 1881, p. 255:) which act provides that: "The City Council in Cities, and board of trustees in villages may levy and collect taxes for corporate purposes in the manner following: The City Council shall, annually, on or before the third Tuesday in September in each year, ascertain the total amount of appropriations for all corporate purposes legally made, and to be collected from the tax levy of that fiscal year; and by an ordinance, specifying in detail the purposes for which such appropriations are made, and the sum or amount appropriated for each purpose, respectively, levy the amount so ascertained upon all the property subject to

taxation within the City or village, as the same is assessed and equalized for State and County purposes for the current year."

R. S. Ill. 1881, Chapter 24, Sec. 111, p. 228.

This act, requires the City Council to determine, each year, what it will require for the different corporate purposes of the municipal government, and to levy the amount required, by ordinance; but under the judgment of the Court, in this case, the City Council can only appropriate for corporate purposes, out of each annual tax levy, what may be left of the seven-tenths of one per cent. after deducting ten thousand dollars, be that more or less.

"Where an inferior tribunal" say the Court in Hull v. Supervisors 19 Johns 259, "has a discretion and proceeds to exercise it, the Court has no jurisdiction to control that discretion by mandamus; but if subordinate public agents refuse to act or entertain the question for their discretion the Court may enforce obedience to the law by a mandamus where no other legal remedy exists."

Hull v. Supervisors, 19 Johns, 259.

The People v. Supervisors, 12 Johns, 414.

The People ex rel v. Board of Supervisors 84 Ill. 303.

The People ex rel v. County of Cass, 77 Ill., 438.

Dunham v. Village of Hyde Park, 75 Ill., 337.

Ex parte Black, 1 Ohio St, 30.

Commonwealth v. Henry, 49 Pa. St., 530.

Hovey v. Mayo, 43 Me., 322.

The Court has found, that the City, has heretofore expended seventy-five thousand dollars per annum, in payment of current expenses, but that such sum is not needed for the present and future years. Suppose, when the City Council meet to make their appropriation to defray the expenses of the municipal government for the fiscal year, they conclude, in the exercise of their judgment, and from the knowledge they possess of City affairs, and the needs and requirements of the case, that the City will need the sum of seventy-five thousand dollars to pay the current expenses of the City government when prudently and economically administered, who is to decide the question? The Court or the City Council? It should be decided by that body, which is, by law, entrusted with the power and authority to determine it, and that body is the City Council and not the Courts. It is not a judicial question, but a political one, to be determined by the City Council, or local legislature of the municipality, upon whom the power has been conferred by the legislature of the State. It is fair to presume, that the members of the City Council, elected by the people of the City for the purpose of carrying on the local government, and being themselves citizens and taxpayers therein, will have a more intimate knowledge of the subject, and

will exercise a better judgment upon the question, than the judicial tribunals of the country can possibly do. Hence the wisdom of the rule, which has been often laid down by this Court as settled law, that the Courts will not interfere with the exercise of official judgment, confided by law to public officers, municipal authorities and other bodies, where its exercise involves any degree of discretion, unless fraud be imputed and shown.

Gaines v. Thompson, 7 Wall, 347.

Litchfield v. The Register and Receiver 9 Wall. 575.

Ex parte Railway Co., 11 Ottos, 720.

Decatur v. Paulding, 14 Peters, 497.

United States v. Seaman 17, How. 225.

United States v. Commissioners of Land Office 5. Wall 563.

Louisiana v. Jumel, 17 Otto, 711.

The Court does not find that there has been waste or extravagance, in the use of the City's revenues, in past years, nor does it find that the municipal authorities have been guilty of any dishonesty or fraud, in the management of the fiscal affairs of the City. The evidence does not show, that the City has in the past, expended unreasonable sums, for services rendered, materials furnished, or labor done, but the testimony of all the witnesses who are acquainted with the facts, is to the effect that the municipal

expenditures have been reasonable, and that seventy-five thousand dollars per annum, has been needed and used in the past to pay these expenses and will be required in the future.

The special fundings of the Court show, that the City, can only raise, by a tax levy of seven-tenths of one per cent. and the incidental revenue derived from licenses, $51,500, to pay its current expenses, and the Court has decided that the City can do without $10,000 of this sum, for the next four or five years, leaving a little more than one-half of the amount which it has heretofore expended for this purpose, and which the evidence shows it will need in the future.

It is a good defense to a mandamus, to levy a tax to satisfy a judgment that the whole amount lawfully to be raised, has been levied and is needed for public purposes.

Cromartin v. Commissioners, 85 N. C. 211.

From the foregoing, we think it clear, that the judgment of the Court below is erroneous, and we ask that the same be reversed.

J. M. FREELS,
B. H. CANBY,
Attorneys for Plaintiffs in Error.

IN UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1883.

THE UNITED STATES, *ex rel.* JOHN F. ZEBLEY.

vs.

THE CITY AND CITY TREASURER OF EAST ST. LOUIS.

MANDAMUS No. 1141.

The important inquiry arising upon the record in this cause is, did the Circuit Court err in the character of final order it awarded relator herein.

It directs the city of East St. Louis, through its proper corporate authorities, to annually, commencing with the year 1883, exercise *fully* all its Charter powers of taxation and revenue, so that there may be appropriated, set aside, and applied, thereout, $13,000 per annum, until the full payment and discharge of relator's judgments, with interest and costs. (P. 11, prin. Rec.)

This $13,000 thus annually ordered paid, is made up of $3,000 from the $\frac{3}{75}$ of 1 per cent. of the real and personal

property tax appropriated by the Charter to the payment of the bonded debt and interest, (Sec. 22, charter, p. 87 prin. Rec.), and therefore there can be no question about the correctness of the final order to that extent.

The remaining $10,000 is ordered paid out of the other $\frac{7}{10}$ of this 1 per cent., and the main controversy concerns the power of the Court to order this.

The Court specially finds that this much of the city's annual resources, derivable from licenses and $\frac{7}{10}$ of its 1 per cent. tax on real and personal property, is "not required to defray the city's necessary current expenses." (P. 12, prin. Rec.)

If the city, by exercising all its powers of taxation and revenue, will have annually, for 1883, and some subsequent years, a *surplus* fund of this amount, not needed to administer its government, the question is, cannot the Court deal with this surplus by *mandamus* in favor of a judgment creditor?

There is no doubt but the law is, that a judgment creditor is entitled to have the whole power of the corporation exerted, if necessary, for the payment of his judgment. Even Charter language, *permissive* only in form, the court will construe to enjoin a positive duty upon the authorities, if need be, to raise revenue sufficient to pay with.

2 Vol. Dil. on M. C. (3d ed.) § 857.

Why should this be the law unless a surplus could be made available toward the payment of judgments?

The answer and replication put in issue the material question, whether or not, if all the city's powers of revenue and taxation were exerted, there would be a surplus of revenue not needed for current expenses. (Pp. 6 and 7, prin. Rec.)

The trial of this issue by the Circuit Court without the intervention of a jury, pursuant to the act of Congress of March 3, 1865, and the special finding of the Court thereon, puts that inquiry beyond *review*.

Morris v. *Jackson*, 9 Wall. 127.
Copelin v. *Insurance Co.* 9 Wall. 467.
Insurance Co. v. *Sea*, 21 Wall. 161.
Coddington v. *Richardson*, 10 Wall. 518.
Miller v. *Insurance Co.* 12 Wall. 300-8.
Insurance Co. v. *Folsom*, 18 Wall. 249.

It would seem as if this ought to end the whole controversy in this case.

Here is an indebtedness of the city, conclusively established by judgments recovered against it in a court of competent jurisdiction, and the creditor is not restricted to any particular property or revenues, or subject to any conditions, unless such judgment so provides.

U. S. v. *New Orleans*, 98 U. S. 381.
Wolf v. *same*, 103 U. S. 360.

We understand the law to be, that the revenues of a city or county cannot be interfered with so far as it may be necessary for the administration of its government; but when there is conclusively established to be a surplus above this, not needed for such operating expenses, that it may be applied toward the payment of these judgments as fully as it might be toward the payment of any other of its indebtedness.

As in point, we cite *United States* vs. *County of Clark*, 6 Otto, p. 211, where "a county subscribed for stock of a railroad company, and issued bonds in payment therefor, pursuant

to a law which authorized a levy of a special tax to pay them, 'not to exceed one-half of one per cent. upon the assessed value of taxable property for each year,' but contained no provision that only the funds so derived should be applied to their payment: *Held*, that the bonds are debts of the county as fully as any other of its liabilities, and that, for any balance remaining due on account of principal or interest after the application thereto of the proceeds of such tax, the holders of them are entitled to payment out of the general funds of the county."

If the special finding of the Circuit Court, as to the city not needing this $10,000 per annum for necessary current expenses, could be gone behind, and the *evidence at large* examined by this Court, it would be seen that the finding of the Circuit Court on this point was sustained by the evidence. The evidence of the different witnesses, whose testimony defendant in error has preserved at large in the bill of exceptions, shows that *their estimate* of the amount *necessary* to pay the city's expenses for 1883, and subsequent years, is based upon *what the city has expended in years immediately past.*

Lovingston's testimony, (p. 46 prin. Rec.)

"I can't say the exact amount of money required."

Launtz's testimony, on cross-ex., (p. 43 prin. Rec.)
Winton's testimony, on cross-ex., (p. 62 prin. Rec.)
Shannon's testimony, on cross-ex., (p. 20 prin. Rec.)

This witness, Shannon, city clerk, testifies that he bases his estimate of cost on what it has cost city since 1880 to operate.

We have, commencing on p. 53 of prin. Rec., a schedule of the city's expenditures for the year ending March 1, 1883, an

examination of which, in connection with some of the witnesses' testimony, will show a large aggregate of items expended by the city for the year ending March 1, 1883, which will not be needed in other years, or ought not to be, if the city is operated upon the most economical basis, and its full powers of revenue are exercised in behalf of judgment creditors, as the law requires.

The testimony in the record shows that East St. Louis has adopted Art. IX of the general law relating to cities, villages, etc.

Testimony of Freels & Canby, (p. 62 Rec.)

This law invests city authorities with power to make local improvements by special assessment of contiguous property. (Hurd's Rev. Stats. 1881, p. 229.) If, by making and repairing sidewalks by special assessment, instead of paying for lumber, nails and labor out of the city's revenue, public money can be saved to apply in discharge of the city's indebtedness, the law is, that the creditors can enforce the exercise of this discretion to their advantage,—the Court construing permissive language as imperative upon the city authorities in such case.

1st Vol. Dil. on M. C., (3d ed.) § 98 and notes.

2d Vol. Dil. on M. C., (3d ed.) § 857 and notes.

The schedule of expenditures by the city for the fiscal year ending March 1, 1883, shows a total expenditure of $73,218.58. (P. 58 prin. Rec.)

Lumber bill for sidewalks	$3,202 00
Nails for sidewalks	321 30
Portion of street labor for sidewalks	
Set Illinois Reports	330 00
Furniture for City Hall, rebuilt	447 25
One less street inspector	680 00
Refunding back taxes, Page & Buckland	1,288 65
Court costs	1,757 90
Judgments against city, paid	2,519 65
Attorneys' fees, in addition to City Attorney	5,571 15
Expense City Library (abolished, p. 47 Rec.)	413 80
Balance on re-building City Hall	2,606 40
Supplies, new City Hall	687 20
	$19,825 40

To say nothing about several thousand dollars additional for labor on sidewalks, etc., which special assessments would obviate, here is some $20,000 which is not needed for necessary current expenses, as shown by an itemized schedule of its last year's operating expenses.

It pays other judgments out of its revenue, and might as well pay relator's. If it is lawful in the one case, it ought to be in this.

The city has a Charter, paid City Attorney, (p. 57 Record,) and yet it employs three or four attorneys at large expense. (P. 43 Record.)

It has paid $35,000 to attorneys since 1879, (p. 48 Record,) nearly enough to pay off relator's judgment.

To allow a city to go on at this rate is to encourage spendthrift and waste, and an utter contempt of its creditors.

Counsel for defendant in error state, in their brief, that the city has annually levied and applied the $\frac{3}{10}$ of 1 per cent. toward the bonded debt. But this must be error, as the City Clerk, Shannon, swears "no part of this 1 per cent. was set apart for the bonded bebt, and none of it paid since 1880. (P. 17 Record.)

So that the city has not only been violating the Charter provision about this $\frac{3}{10}$ of 1 per cent., but has been using it, with its other revenue, to pay extravagant bills of costs and attorneys' fees, largely in quarreling over two sets of city officers, and some of it resisting this very bonded debt for which the Charter appropriates the $\frac{3}{10}$ of 1 per cent. (P. 19 Record.)

As it now is, everything is extravagant and loose in the management of city affairs. Lumber which the city buys to construct walks along private property, it pays for with city warrants at 85 cents, and afterwards redeems them at par. (Pp. 46 and 47 Record.)

If the law is as we insist, that these judgments are now indebtedness, conclusively established against the city like any other indebtedness, not limited or restricted in its mode of payment, then, under the Charter power, the city has to appropriate money and provide for the payment of the debt and expenses of the city. (P. 23 Record.)

A creditor can, by *mandamus*, compel the city so to govern and manage its affairs as that its current expenses will be reduced to the lowest possible figure, and the excess preserved and applied toward the extinguishment of his claims.

To recur to our original proposition, and law, we think the finding of the Circuit Court, that there is an annual excess of $20,000 not needed for current necessary expenses, is conclusive, and cannot be reviewed, and that the power of the Court to deal with it after judgment, and with a view to their payment, is unquestionable.

If the question can properly arise under the findings and order of the Court in this case, we shall insist that the relator would be entitled to a special tax outside of this 1 per cent. to pay his judgments.

It is assumed by counsel for defendants in error, that the bonds are issued under *express* provisions of the Charter, and payment thereof limited by the $\frac{3}{10}$ of 1 per cent. provision; whereas, the Illinois Supreme Court have decided that the express provisions of Section 4, Art. 3, of the Charter, allowing the city to issue $100,000 of bonds, has nothing to do with the city's authority to issue bonds in excess of the $100,000 with which to pay its current expenses. The Court must assume, by the decision, that, as the city has authority to *provide for the payment of its debts and expenses*, and is not limited as to its *means* of doing so, that it may issue bonds therefor. The limitation upon its issuing only the $100,000, applies only to bonds issued for *borrowed money*.

Barrett v. *E. St. Louis*, 89 Ill. 175.

The resulting reasoning from this decision is that a city may, under the provision in its Charter *to provide for the payment*

of its debts and expenses, issue bonds, if it has no money, and is not beyond the constitutional limit in debt, by virtue of an inherent power to do so.

Galena v. *Corwith*, 48 Ill. 425.

County of Jackson v. *Rendleman*, 100 Ill. 379.

If this be good reasoning and law, then what has the limitation of $\frac{3}{10}$ of 1 per cent. to do with other bonds than those issued under *express provisions* of the City Charter, viz: the $100,000 of bonds for borrowed money?

The decision of this question may possibly not arise under the findings and order in this case, but if it can, we direct the attention of the Court to this view of the subject.

If the Circuit Court committed any error at all, we think it was in not ordering the application of the entire $\frac{3}{10}$ of the 1 per cent. instead of only a portion thereof toward the payment of relator's judgments. No other creditor was complaining, and the diligent ought to have the preference to the entire amount.

E. St. Louis v. *Underwood*, 105 Ill. 308.

Respectfully submitted.

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